IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.2218 OF 2005

IN

SUIT NO.574 OF 2004

1.Rasiklal Manikchand Dhariwal & others. ...Plaintiffs.

vs.

1.Shri.Kishore Washwani & another. ...Defendants.

Mr.Ravi Kadam, Advocate General with V.R.Dhond, Vicky Singh i/b. M/s.Mulla & Mulla & CBC, for Plaintiffs.

Mr.Ashwin Naik with Sandip Parekh and Hemang Engineer i/b. M/s.Gordhandas & Fozdar, for Defendant no.1.

Mr.D.D.Madam with Vinod Bhagat, Kiran Mehta, Sanjeev Sachdeva, Vivek Gautam i/b. G.S.Hegde & V.A.Bhagat, for Defendant no.2.

CORAM: D.K.DESHMUKH,J.

DATED: 28th MARCH,2007..

P.C.:-

1. This is a notice of motion taken out by the defendant no.1. Though by prayer clause (a) of the notice of motion ,the defendant no.1 is claiming order that the plaint should be rejected, the learned Counsel appearing for defendant no.1 at the outset stated that the defendant no.1 is not pressing the relief claimed by prayer clause (a). The relief claimed by prayer clause (b) is that the plaintiffs be directed to remove the name of the defendant no.1 from the plaint. In short, the defendant no.1 claims an order of dismissal of suit as against the defendant no.1. According to the defendant no.1, the suit is for passing of the trade mark "Manikchand". According to the defendant no.1, he was the owner of the trade mark "Malikchand" but he assigned that trade mark to defendant no.2 by the deed of assignment dated 1.4.1996, therefore, he does not have any interest in the trade mark "Malikchand" in relation to which the grievance is made in the plaint. Therefore, he is not a proper party nor a necessary party in the suit. Perusal of the averments in the plaint shows that the plaintiffs have joined the defendant no.1 as a party to the suit because according to the plaintiffs when they wanted to apply for registration of their trade mark "Manikchand", their attention was drawn to the advertisements issued for the application of trade mark "Malikchand"

and that application for trade mark "Malikchand" was made by the defendant no.1. The defendant no.1 does not dispute that he had made an application for registration of the trade mark "Malikchand". He also does not dispute that the application was made by him after the alleged deed of assignment. According to him, that application was made inadvertently and that application has been withdrawn by letter dated 28.10.2004 and therefore, according to the defendant no.1, now he has no stake in the trade mark "Malikchand", and therefore, he is not a proper party nor a necessary party to the suit. This position is disputed by the plaintiffs. According to the plaintiffs, the claim of the first defendant that he has assigned the trade mark to the defendant no.2 is highly suspect and doubtful and cannot be accepted, because according to the plaintiffs, though the defendant no.1 claims that he had assigned the trade mark to defendant no.2 by Deed of assignment dt.1.4.1996 the same defendant no.1 made an application for registration of mark "Malikchand" on 23.9.1996. He again made an application on 1.5.1997 and both these applications were advertised and on 13.5.2004 the first defendant filed a counter statement before the Registrar asserting the proprietorship of the said mark. The plaintiff therefore, submits that the statement made by the defendant no.1 that he has assigned the trade mark to defendant no.2 and therefore, he does not have any interest in the trade mark, cannot be accepted.

2. Now it is clear from the affidavit filed in support of the notice of motion that the only ground on which the defendant no.1 claims that his name should be deleted from the array of the defendant is that on 1.4.1996 he has assigned the trade mark to defendant no.2. So far as the applications made by him for registration of the same trade mark after 1.4.1996 are concerned, the defendant no.1 says that they have been made by him inadvertently and therefore, he withdrew them on 28.10.2004. But the plaintiffs have pointed out that even after filing those applications, again claim was made on 13.5.2004 asserting that the defendant no.1 is a proprietor of the mark. Though the defendant no.1 has filed rejoinder, there is no explanation to be found about filing of the counter statement on 13.5.2004. The conduct of the first defendant of filing counter statement on 13.5.2004 creates doubt about his case that he has filed the applications dated 23.9.1996 and 1.5.1997 inadvertently. Therefore, in my opinion, there is sufficient ground for the plaintiffs to believe that the first defendant continued to have interest in the trade mark "Malikchand" against which the grievance is made in the present suit. In any case, even if, it is assumed that the defendant no.1 because of the deed of assignment is not a necessary party to the suit, as admittedly the first defendant was the owner of the trade mark at one point of time he may be proper party to the suit whose presence before the Court may be necessary for adjudication of

the subject matter of the suit. Therefore, in my opinion, it will not be appropriate to direct the plaintiffs to delete the name of defendant no.1. In any case, if ultimately it is found by the Court that it was not necessary for the plaintiffs to join the defendant no.1 as a party to the suit, the defendant no.1 can always pray before the Court for grant of compensatory cost for having dragged him in the Court unnecessarily.

3. Taking overall view of the matter therefore, in my opinion, it will not be in the interest of justice to grant this notice of motion. The notice of motion is, therefore, disposed of.